

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 6TH SEPTEMBER 2007 / 15TH BHADRA 1929

SA.No. 637 of 1994()

(AGAINST THE JUDGMENT AND DECREE DATED 30/09/1993 MADE IN
AS.17/1991 ON THE FILE OF THE COURT OF THE SUBORDINATE JUDGE
OF PALAKKAD, WHICH APPEAL WAS AGAINST THE JUDGMENT AND
DECREE DATED 18/01/1988 MADE IN OS.197/1977 ON THE FILE OF THE
COURT OF THE MUNSIF OF CHITTUR)
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APPELLANTS:RESPONDENTS 6,12 & 13 – LEGAL HEIRS OF PLAINTIFF:

1. KAMARUDEEN, S/O.LATE ABDUL RAHIMAN RAWTHER.
2. MOHAMMED RAFI (MINOR), REPRESENTED BY THE FIRST APPELLANT GUARDIAN FATHER.
3. MOYHAMMED JAFARLAL (MINOR), REPRESENTED BY THE FIRST APPELLANT GUARDIAN FATHER.

ALL ARE RESIDING AT KADEVALAVIL, THATHAMANGALAM
VILLAGE, CHITTUR TALUK, PALAKKAD DISTRICT.

BY ADV. SRI.V.CHITAMBARESH
SRI.T.C.SURESH MENON

RESPONDENTS: APPELLANT:DEFENDANT:

1. CHAMI, S/O.KANKAARA ALIAS AYYAPPAN,
RESIDING AT NELLIKKADE, THATHAMANGALAM VILLAGE,
CHITTUR TALUK, PALAKKAD DISTRICT.

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2. **ABDUL WAHAB, RESIDING AT KADEVALAVIL,
THATHAMANGALAM VILLAGE, CHITTUR TALUK,
PALAKKAD DISTRICT.**
3. **KARIM, RESIDING AT KADEVALAVIL,
THATHAMANGALAM VILLAGE, CHITTUR TALUK,
PALAKKAD DISTRICT.**
4. **ABDUL JALEEL, RESIDING AT KADEVALAVIL,
THATHAMANGALAM VILLAGE, CHITTUR TALUK,
PALAKKAD DISTRICT.**
5. **SANTHU MOHAMMED, RESIDING AT KADEVALAVIL,
THATHAMANGALAM VILLAGE, CHITTUR TALUK,
PALAKKAD DISTRICT.**
6. **MUHAMMED BASHEER, RESIDING AT KADEVALAVIL,
THATHAMANGALAM VILLAGE, CHITTUR TALUK,
PALAKKAD DISTRICT.**
7. **JAILABUDEEN, RESIDING AT KADEVALAVIL,
THATHAMANGALAM VILLAGE, CHITTUR TALUK,
PALAKKAD DISTRICT.**
8. **MUHAMMED SALUDEEN, RESIDING AT KADEVALAVIL,
THATHAMANGALAM VILLAGE, CHITTUR TALUK,
PALAKKAD DISTRICT.**
9. **BADARUDHEEN, RESIDING AT KADEVALAVIL,
THATHAMANGALAM VILLAGE, CHITTUR TALUK,
PALAKKAD DISTRICT.**
10. **ZEENATH, RESIDING AT KADEVALAVIL,
THATHAMANGALAM VILLAGE, CHITTUR TALUK,
PALAKKAD DISTRICT.**

BY ADV. SRI.G.HARIHARAN)
SRI.A.SREERAMAKRISHNAN) for R1
SRI.H.SIVARAMAN for R2,R3,R4,R6,R7,R9 and R10

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 06/09/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

ORDER IB C.M.P.NO.1294/1994 IN S.A.NO.637/1994

DISMISSED

6/09/2007

SD/- M.SASIDHARAN NAMBIAR, JUDGE

/TRUE COPY/

P.A.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 637 OF 1994

Dated 6th September 2007

J U D G M E N T

Suit was originally filed for a decree for injunction. Suit was originally decreed on 31/10/1977. A.S.169 of 1977 was filed challenging the decree. That appeal was allowed and suit was remanded. Trial court thereafter dismissed the suit as per judgment dated 19/12/1979. Plaintiff filed A.S.45 of 1980 challenging the decree. First appellate court once again remanded the suit after setting aside the decree. Plaint was thereafter amended seeking a decree for recovery of possession. Suit was once again dismissed. It was challenged before Sub court, Palakkad in A.S.74 of 1984. Dispute then centred around the identification of the property. First appellate court found that property was not correctly demarcated. Plaintiff was claiming title under Ext.A1 sale deed executed by Dakshayani Amma and others. Respondent/defendant is claiming title under Ext.B1 purchase certificate issued by Land Tribunal. Property of respondent is lying just to west of

property of appellant. To the west of property of respondent is the property of his brother, who obtained that property under Ext.X1 purchase certificate. First appellate court in A.S.74 of 1984 found that Commissioner has excluded vacant land which lies to the east of western permanent compound wall, while measuring property of respondent and his brother and respondent has no case that anybody else have right over that vacant land. First appellate court therefore directed the trial court to remit the report back to the Commissioner with a direction to measure the property of respondent and his brother, from the western compound wall which is the permanent boundary and thereafter fix the property of appellant claimed under Ext.A1 sale deed. Commissioner submitted Exts.C10 plan and C11 report thereafter. Trial court then found that Commissioner in Ext.C10 plan also did not include a portion of the property having a width of 420 links for the reason that it is a way. Court therefore found that that much extent of the property should be added to the property of appellant under Ext.A1. A decree for recovery of possession was granted, directing respondent to surrender 420 square links of property, which lies immediate to east of the property found in

possession of appellant by the Commissioner. Respondent challenged the decree and judgment before Sub court, Palakkad in A.S.17 of 1991. Learned Sub Judge over looking the order of remand, relied on Exts.C8 and C9 report and plan relying on by the trial court earlier by which the suit was decided earlier and was challenged in A.S.74 of 1984. Learned Sub Judge relying on Exts.C8 and C9, which were directed to be remitted back to Commissioner to file a further report after measuring property from western permanent boundary, held that disputed portion forms part of property of respondent and set aside decree and dismissed suit. It is challenged in second appeal.

2. Second appeal was admitted formulating following substantial questions of law.

1) Whether first appellate court was correct in law in making a departure from the finding rendered in the order of remand, when parties are precluded from disputing its correctness, if not appealed against, under Section 105 (2) of Code of Civil Procedure.

2) Whether first appellate court was justified in placing reliance on Exts.C3, C4, C8 and C9 reports and plan which were superseded by Exts.C10 plan

and C11 report, pursuant to the directions in the order of remand.

3) Was first appellate court justified in reversing the decree of the trial court when evidence establish that respondent trespassed into an area of 420 square links belonging to appellant.

3. Learned counsel appearing for appellant and respondent were heard.

4. Learned counsel relying on sub section 2 of Section 105 of Code of Civil Procedure argued that first appellate court was not justified in ignoring the findings in order of remand which has become final and when an order of remand directs that properties are to be measured from the western permanent boundary, without excluding any vacant space, the finding of first appellate court that properties are to be fixed with reference to Exts.C8 and C9 are unsustainable and in the light of the order of remand which is binding on respondent, respondent cannot be heard to contend that there is a public pathway, between the property covered under Ext.X1 and the western compound wall and therefore the decree of trial court is to be restored. Learned counsel submitted that even if the actual extent trespassed upon by the respondent is to

be fixed, it can be fixed at the execution proceedings.

5. Learned counsel appearing for respondent argued that evidence establish that there is a public pathway in between the property of brother of respondent and the western compound wall and that pathway is not part of property obtained by respondent under Ext.X1 and therefore first appellate court held that appellant is not entitled to the decree for recovery of possession granted by the trial court.

6. As rightly pointed out by learned counsel appearing for appellant, in view of sub section 2 of Section 105, as respondent did not challenge the findings of first appellate court in the order of remand in A.S.748 of 1984, respondent cannot contend that there is a vacant space in between the property of his brother under Ext.X1 and the western permanent boundary and he is also not entitled to contend that the property covered under Exts.X1 and B1 are to be fixed excluding any vacant space, from western boundary as direction the direction in the order of is to measure the property from western permanent boundary, with the specific finding that respondent has no case that anybody else have any right over the vacant space which was left while fixing the

property by Commissioner under Exts.C8 and C9 plan and report. In the light of the findings and directions in the order of remand first appellate court was not at all justified in relying on Exts.C8 and C9. The finding of first appellate court in the order of remand in A.S.74 of 1984 was that the property cannot be fixed with reference to Exts.C8 and C9 as vacant space in between western permanent boundary and property of brother of respondent, was excluded by the Commissioner. In such circumstances, the decree and judgment passed by first appellate court can only be set aside.

7. Then the question is whether the decree granted by trial court is to be restored. In spite of specific direction in the order of remand, perusal of Ext.C10 plan and C11 report, show that Commissioner did not fix property in accordance with the directions. What was directed in the order of remand was to fix property covered in Ext.X1 by measuring eastwards from the western permanent compound wall and after fixing the property covered under Ext.X1 property covered under Ext.B1 which lies immediately to its east is to be fixed. It is thereafter property belonging to appellant under Ext.A1 is to be fixed. As it is seen from Exts.C10 and C11 that the

direction was not complied with a decree cannot be granted in accordance with Ext.C10 plan also. It is for that reason, trial court directed recovery of possession of the property from the possession of respondent which lies immediately to the east of his property, having an extent of 420 square links being area covered by the so called pathway which was measured by commissioner.

8. Considering the contentions raised by the parties and taking note of the fact that before taking delivery measurement of the property is to be made it is in the interest of justice to provide that executing court has to appoint a Commissioner at the expense of the decree holder, to measure property covered under Exts.X1 and B1 before directing delivery of property. Appellant/plaintiff is entitled to recover possession of remaining property in the possession of respondent, after fixing the property covered under Ext.X1 and Ext.B1. Therefore appeal is allowed. Decree and judgment passed by learned Sub Judge are set aside and the decree granted by trial court is confirmed with following modifications. Executing court shall appoint a Commissioner at the expense of the decree holder. Commissioner shall measure the property and fix the property covered under Ext.X1

from measuring that property from the western compound wall which is the permanent boundary and thereafter to fix the property covered under Ext.B1. Remaining property in the possession of respondent shall be delivered to the appellant. It is made clear that no land is to be excluded to the east of the western boundary while measuring either as pathway or as vacant land.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.637 OF 1994

6th September 2007

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